United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2290

To be argued by
ALAN DERSHOWITZ

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-2290

UNITED STATES OF AMERICA,

Appellee,

—against—

EDMUND ROSNER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANT EDMUND ROSNER

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

v.

74 - 2290

EDMUND ROSNER,

Appellant.

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REPLY BRIEF FOR THE APPELLANT

INTRODUCTION

Since the filing of appellant's original brief, a recent case has come to counsel's attention which is indistinguishable from this case and dispositive of the appeal. In Williams v. United States, 500 F.2d 105 (9th Cir., 1974), one of the witnesses against the appellant had, after appellant's conviction, pleaded guilty to several counts of perjury in an unrelated case. Although the witness had only corroborated the testimony of the Government's main witness, the Ninth Circuit held that a new trial was required under the principles of Mesarosh v. United States, 352 U.S. 1 (1956). The Government, in this case, concedes that "Mesarosh is the law in the Circuit and District Courts of the United States. . . .", citing United States v. Chisum, 436 F.2d 645 (9th Cir., 1971) -- the very case relied on by the Williams court.

In Williams there was no finding -- as there has been here -- that the witness perjured himself at the appellant's trial; nor was there any suggestion of even

the slightest wrongdoing or knowledge on the Government's part. Indeed, the Court commended the Government for prosecuting the witness but concluded that its decision to prosecute "impaired his integrity and credibility."* The Court thus held that since the jury "might not" have convicted without the tainted witness' evidence, a new trial was required:

> Only the jury can determine what it would do on a different body of evidence. . . . (500 F.2d at 108, quoting Mesarosh).

The facts in this case -- the massiveness of the perjury, the central role of Leuci, the admitted instances, at least, of Government negligence -- make this case a far more compelling one for reversal than Williams was. Appellant invites the Government to attempt to distinguish Williams either in a supplemental document or at oral argument. Appellant is confident that there are no meaningful distinctions. Thus, an affirmance by this Court would create a clear conflict between the Circuits.

In light of Williams -- and the line of cases it follows -- this Court need not even meet the issues raised in the Government's brief; i.e., the propriety of its actions, the Government's responsibility for Leuci's perjury, the sufficiency of the evidence without Leuci's live testimony. Reversal is required on the single fact

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* The fact that the Government here has chosen not to prosecute Leuci for his admitted perjury surely cannot inure to its advantage in this case.

that the Government now acknowledges that its critical witness perjured himself at appellant's trial. Appellant will, however, reply to the points raised in the Government's brief.

I. THE GOVERNMENT'S "EXCUSES" FOR ITS SUPPRESSION OF EVIDENCE

The Government offers three justifications for its admitted repeated failures -- both pre- and post-trial -- to disclose information of the kind requested by Rosner and that was admittedly in its files: 1) As to some of the information, the claim is made that although that information was known to certain members of the United States Attorney's Office, it was not known to the two Assistant United States Attorneys who tried the Rosner case (See e.g., G.Br. pp, 11, 15, 17, 25); 2) As to other pieces of information, the Government asserts that the member of the Office who decided not to disclose it had determined that it was insignificant or irrelevant (See e.g., G.Br. pp. 16, 18, 24, 26, 27); 3) As to still other information conceded to be known to the appropriate member of the Office, and explicitly found to be relevant by Judge Bauman (See Op. A. 1309), the claim is made that the information was thought to be untrue or unsubstantiated* (See e.g., G.Br. pp, 14, 20, 21). None

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* The Government takes the position that the District Court had ruled that it was under no obligation to disclose the details of unsubstantiated allegations of misconduct made against Leuci (G.Br. p. 21). But the Goe memorandum (and Leuci's description of its contents to Shaw and other government agents) were not unsubstantiated allegations; they were direct admissions. Nor can the Leuci-Lawrence tape be characterized as unsubstantiated allegations. Finally, the Judge's ruling was made in the context of a request to subpoena state records, which the Judge deemed privileged under state law.

The Government faults Rosner for his decision not to call Lawrence to the witness stand at the hearing, after relying on Lawrence's affidavit in his original motion

(footnote continued on following page)

of these justifications is supported by the relevant facts and applicable law: 1) The Government ignores Judge Bauman's conclusion that "the acts (of non-disclosure of information) are attributable to the Government" and that the fact that neither Scoppetta nor Shaw participated in the trial was immaterial; "it is now settled law that the misdeeds of one member of a prosecutor's office are attributable to the prosecution as a whole" (Op. at 9, citations omitted). Moreover, Judge Bauman emphasized that this finding was not solely a matter of abstract principle, as he concluded as a matter of fact that Shaw and Scoppetta were "deeply involved" in the Rosner case and were indeed the lawyers primarily responsible for the production of § 3500 material for that trial (Op. A.1296-97). 2) When the Government has information in its files and it receives repeated pre-trial and post-trial Defense requests for information of that kind, it is not for the Government to decide that the information need not be disclosed on the basis of its own ex parte determination of relevance or importance. U.S. v. Bonanno, 430 F.2d 1060, 1063 (2d Cir.,1970); see also Giles v. Maryland, 386 U.S. 66, 98 (1966) (concurring

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(footnote continued from preceding page)

for a new trial. What the Government neglects to mention is that at the time that Lawrence's affidavit was filed, it was the best evidence possessed by Rosner of Leuci's extensive criminality. By the time of the hearing, however, Leuci had come forward with his own admissions, which then became the best evidence. It was unnecessary, therefore, for Rosner to call Lawrence, Moreover, the Government was, of course, free to call Lawrence as its witness had it chosen to do so.

opinion of Mr. Justice Fortas); cf. Alderman v. United States, 394 U.S. 165 (1969). 3) Similarly, the prosecution cannot arrogate to itself the judge, jury and defense functions, and suppress evidence it considers false or unreliable. U.S. ex rel Meers v. Wilkins, 326 F.2d 135, 139-140 (2d Cir., 1964); U.S. v. Bonanno, supra.

II. THE GOVERNMENT'S DISTORTION OF THE LAW AND OF THE RECORD RELEVANT TO DETERMINING WHETHER THE NEWLY DISCOVERED EVIDENCE OF LEUCI'S CRIMINAL PAST "MIGHT" RESULT IN A DIFFERENT VERDICT

The Government attempts to refute Rosner's claim that the newly discovered evidence of Leuci's massive criminal history might have produced a different verdict by asserting two wholly spurious arguments: (A) that the jury would never have learned of Leuci's vast criminal accomplishments because the trial judge could have exercised his discretion to exclude such evidence as cumulative and collateral; and (B) that Rosner's conviction was based on evidence which did not depend on believing Leuci's live testimony.

A) The Government's theory that evidence of Leuci's additional crimes would have been merely cumulative and collateral and hence entirely excludable is riddled with omission and illogic. In the first place, the Government completely ignores the critical fact that the nature, variety, and sheer magnitude of Leuci's

"additional" crimes wholly changes the apparent character of the witness.* At trial, Leuci admitted to participating in four situations which the Government appropriately characterized as mere "acts of misconduct" (G.B. at 33), which netted Leuci several thousand dollars, and the last of which supposedly occurred five years before the trial, in mid-1967 (T.Tr. 353, 380, 384). In truth -- as Leuci's recent admissions establish -- Leuci was a full-time felon who, while disguised as an officer of the law, engaged daily in serious and varied criminal acts, and over the course of a decade committed hundreds upon hundreds of crimes involving perhaps as much as $200,000 in illegally obtained money, and whose most recent admitted participation in crime apparently occurred only six months before Rosner's trial. Incredibly, the Government appears to be asking this Court to conclude that the irrefutable evidence -- not mere allegations of unproved crimes but sworn, non-coerced admissions by the perpetrator himself -- that Leuci was a drug distributor and receiver, a burglar, a thief, a "protection" operator, an illegal wiretapper, a bribe recipient and conduit, and an inveterate liar would be evidence which is merely cumulative of Leuci's admissions of several isolated instances in which he acted as intermediary in sales of information. That assertion is simply

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* Judge Bauman recognized this in his decision below when he noted that Leuci's perjurious denial of his criminal past "would be a matter of serious concern" had Leuci's credibility been at issue with the jury (See e.g., Slip Op. at A. 1299, 1313).

absurd and is indeed undercut by the Government's very own recognition that "If excessive evidence of Leuci's acts had been placed before the jury there would have been a serious danger that it would have been used to impeach Leuci generally as a witness by conduct not resulting in a conviction...."* (G.Br. at 34, emphasis added). Indeed, the newly discovered evidence of Leuci's crimes, far from being merely cumulative, presents a totally new and different picture of the witness and as the Government virtually concedes, casts a totally different light on his possible motivation and his credibility.

Secondly, the Government's arrogant suggestion that the trial court would have excluded evidence which establishes the full scope and magnitude of Leuci's criminal past is speculative and flies in the face of the record of this case. The best evidence of what the trial court would have done is what it indeed did do. At the trial, Judge Bauman set no limit on the efforts of defense counsel to inquire into Leuci's past and to attempt to elicit from Leuci admissions of additional acts of "misconduct." Further, during the proceedings on the first new trial

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* The Government adds that using evidence of Leuci's criminal past to impeach him "generally as a witness" would be an "improper use" (G.Br. at 34). Why this would have been an improper use is not clear; the fact that Leuci had engaged in hundreds upon hundreds of criminal acts for which he had not yet been convicted would have been extremely relevant on the issue of Leuci's motivation to testify for the Government -- and thus on his credibility "generally as a witness."

motion, in which the appellant attempted to adduce evidence that Leuci had committed "additional" crimes, and during the recent proceedings in which the appellant finally succeeded in adducing such evidence, Judge Bauman made it clear that he considered such evidence to be relevant to the jury's determinations. Although the Government argued repeatedly during the course of the proceedings on this motion that evidence of Leuci's additional crimes would -- and should -- be excluded, the Judge never once suggested that he would do so.

A third fallacy in the Government's analysis of the issue of the admissibility of the newly discovered evidence is that that analysis is premised on the incredible assumption that this case must be decided as if Leuci did not perjure himself at the trial. The Government treats the case as if Leuci had in fact told the truth about himself in the first instance and had merely omitted to fill in a few details of additional crimes.* It is only when viewed from that perspective -- as if the jury were already properly informed -- that evidence of Leuci's "additional" crimes could be trivialized as merely "cumulative."

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* Of course, had Leuci not perjured himself -- had he in the first instance depicted himself honestly and accurately as a full-time major criminal -- then the defense would most probably have had little need to embellish that picture since, as the Government has all but conceded, full disclosure would have impeached Leuci "generally as a witness" (See G.Br. at 34).

But the fact of Leuci's perjury cannot so lightly be ignored, and there is simply no basis in law or in logic to treat this case as if that perjury had never occurred. In light of that perjury, whether one looks at the past trial or at a new trial in the future, it is clear that evidence of Leuci's entire criminal history must be admissible to expose and establish that perjury.* And this is particularly so considering that Leuci was the Government's chief witness against Rosner at trial, that Leuci had been in charge of investigating and building the case against Rosner, and that from the outset of his trial preparation Rosner had made every conceivable effort to obtain the information within the possession of the Government concerning Leuci's crimes and had openly built his defense strategy around exposing Leuci's full criminal past, and thus destroying his credibility.

B) The Government's contention that Rosner's conviction depended solely on Rosner's admissions and on the tape recorded conversations is based first on the application of an entirely erroneous standard of review, and secondly on a gross distortion of what the evidence, shorn of Leuci's testimony, does "prove."

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* At the past trial, admissions contradicting Leuci's denial of crimes on direct testimony surely would not have been excluded on cross; at a future trial, Leuci's admissions would obviously be admissible as prior inconsistent statements.

Although the Government gives lip service to the proper standard of review -- "whether the new evidence 'might' have resulted in a different verdict" (G.Br. at 31) -- it then proceeds to turn that standard on its head and to analyze the case in terms of whether or not, regardless of the newly discovered evidence, there exists evidence in the record, apart from Leuci's live testimony, which might sustain the same verdict. The Government lays out in detail every bit of the non-Leuci evidence it can muster which can arguably support Rosner's conviction, and on the basis of that evidentiary presentation, the Government concludes: "In sum, this Court can find at least five important areas of predisposition evidence based on recordings and conceded facts which were presented at trial" (G.Br. at 48). At its strongest then, the Government argument reduces to a claim that this Court -- or a jury or a single juror -- "can find" sufficient evidence in the record, apart from Leuci's live testimony, to convict.

A claim of sufficiency however, is wholly irrelevant to the issue now before this Court. While the application of the sufficiency standard would, of course, be appropriate were this case on appeal from a conviction based on Rosner's testimony and the tapes, the only standard relevant here is whether or not a jury -- or indeed a single juror -- might have been persuaded by his or her view of

the entire case not to convict. Indeed, even if there were sufficient non-Leuci evidence in the record to convict, that simply does not mean that a jury would necessarily do so. The Government's argument misses this critical point entirely.

The Government also ignores entirely a major aspect of the appellant's argument in support of his claim that a new jury might reach a different result. The best evidence of whether a new jury might be affected by the newly discovered evidence of Leuci's crimes is obviously whether the actual jury was affected at all by Leuci's live testimony. In his main Brief on this appeal, appellant analyzed and presented in detail the overwhelming evidence in the record of this case as to what affected the jury's verdict (App.Br. 34-47). That evidence includes the Government's arguments to the jury and to this Court, which focused primarily on facts derived from Leuci's live testimony, and in particular on Leuci's version of the unrecorded meetings; the jury's several requests for transcripts and for further instructions from the Judge regarding the issue of Leuci's credibility; and this Court's affirmance on the original appeal, which rested heavily on Leuci's live testimony, and particularly emphasized facts relating to the unrecorded meetings. In the face of that record, it simply cannot be said that the jury was not affected by Leuci's live testimony. Indeed, the Government used every

effort at trial to ensure that the jury was affected by Leuci's versions of events. Since the Government succeeded in obtaining the jury result which it sought, it is absurd to assume that it failed entirely in its efforts to persuade the jury to believe Leuci. Consequently, since it plainly cannot be said that Leuci's testimony had no impact on the jury, it cannot be said that the jury could not conceivably change its mind if presented with the newly discovered evidence destroying Leuci's credibility. Yet amazingly, the Government totally ignores this central and devastating argument. Not once does the Government attempt to reconcile its current position with the arguments it previously presented to the jury and to this Court,* nor to reconcile it with the record fact that the original conviction was sustained by this Court precisely on an analysis of evidence derived almost entirely from Leuci's live testimony (See App.Br. 44-47).

Instead of meeting the appellant's argument directly, the Government evades and attempts to mask the issue by its conclusory assertion that "Rosner's guilt was not established by Leuci's uncorroborated testimony, but by substantial other evidence, primarily tape recordings

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* The Government does assert in passing that "the unrecorded conversations...were not crucial to the Government's case" (G.Br. p, 46, note) but, it makes no attempt to explain or justify the 180 degree reversal in its position.

of conversations between Rosner and Leuci and Rosner's own admissions at trial." That assertion is absurd. As noted above, the record proves that it cannot be said that "Rosner's guilt was not established by Leuci's uncorroborated testimony," and further the record proves that, at best, both (1) Rosner's testimony and (2) the tapes, are open to conflicting interpretations.

(1) Rosner's testimony

The Government asserts that "Rosner's admissions relate not only to...the facts of the underlying offenses, but also to facts showing his predisposition" (G.Br. p, 48, note*). But that assertion again misses the point: even if Rosner's testimony does provide some facts "showing" predisposition,* it does not provide evidence of predisposition which is irrefutable, and in the face of which the jury would be compelled to convict.

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* At least one example set forth by the Government as an admission of Rosner's which allegedly "shows" predisposition is totally absurd. The Government refers twice to Rosner's testimony that prior to meeting Leuci on October 4th Rosner discussed the Marcone case with a defense attorney, Gino Nigretti, who was involved in that case (See G.Br. p, 40, note*, p. 48, note*). Rosner, it must be remembered, was himself a defense attorney at the time of this conversation; how the Government can rely on an "admission" by one defense attorney that he "asked" another defense attorney about a case as "irrefutable" proof of "predisposition" is beyond comprehension. If that were proof of "predisposition" to commit acts of corruption then virtually every defense attorney would be guilty of being so "predisposed."

Indeed, the very fact that the issue of entrapment was submitted to the jury totally undercuts the claim that Rosner's testimony can only be interpreted as establishing his guilt. By leaving the issue to the jury, the trial Court (and this Court) explicitly recognized that Rosner's testimony, if believed, provided "enough credible evidence... to sustain the defense of entrapment" 485 F.2d 1222 (See App.Br. 45). Were the Government correct in its absurd claim that Rosner's own admissions preclude a finding of no predisposition, then the trial Court was in error in submitting the issue to the jury. Even now the Government does not raise such a challenge. In the face of this record, it simply cannot now be said, as the Government would like to argue, that Rosner's own testimony precludes the possibility that a new trial <u>might</u> result in a new verdict.

(2) <u>The tapes</u>

The Government's major factual contention on this appeal is that the tape recordings provide "irrefutable" evidence of Rosner's predisposition. That contention is wholly destroyed by a careful analysis of the tapes.

The Government posits and relies upon the following interpretation of the two key Leuci-Rosner tapes:

> "The tape recordings of the 13th and 15th did not show a lawyer who was 'panicky' or whose 'head was swimming,' as Rosner claimed he was at all times by way of defense. They evidence, rather, the actions of a calculating professional who: (a) insisted on receiving the Grand Jury minutes; (b) haggled over the price of the minutes; (c) laughingly participated in a corrupt conversation concerning the Quinones case... and (d) told Leuci to get information about Stewart, a relocated witness. These two recordings themselves pr ed beyond any shadow of a doubt Rosner was ready, willing, and able to commit the offenses he admitted" (G.Br. p. 46-47).

The Government further claims that the tape recordings fail to support Rosner's testimony that his sole interest was in his own situation, that he was induced by Leuci's talk of "murder, remand and Marcone," and that he was "pressured" by Leuci to pay money to obtain information (See e.g., G.Br. 44, 47, note*, 48, note**). Upon close analysis, however, not one of the Government's assertions regarding the tapes holds up. In the sections that follow, the appellant examines each Government assertion in turn and demonstrates that, at best, the tapes

are ambiguous as to whether or not Rosner's conduct on the 13th and thereafter evinced predisposition. Indeed, appellant demonstrates that the tapes fail absolutely to provide "irrefutable" evidence of Rosner's alleged predisposition and cannot serve as a substitute for a credible witness. The Government claims that "Rosner's interpretation of the tape recordings are tortured and absurd" (G.Br. p. 43, note). The appellant invites this Court to listen to all of the tapes and to satisfy itself as to whether the tapes are, as the Government contends, susceptible of no conceivable interpretation other than the one posited by the Government, or whether they are, as the appellant submits, at least open to varying interpretations.

a) Rosner's alleged insistence on receiving the Grand Jury's minutes

To support its allegation that Rosner "insisted on receiving the Grand Jury minutes," the Government does not point to recorded statements made by Rosner ; rather it asserts that "Rosner's eagerness" is demonstrated by taped evidence that "Leuci resisted time after time Rosner's requests to turn over such statements...." (G.Br. p. 42). Incredibly, the Government, even when ostensibly relying on the objective tapes, once again relies on statements made by Leuci as conclusive evidence about Rosner's state

of mind.* But more incredibly, analysis of Leuci's allegedly "resistant" statements totally undermines the Government's characterization of Rosner's conduct. First of all, the Government can point to only two statements to support its contention that "Leuci resisted time after time" (G.Br. p. 42). Both occurred during the October 13th discussion of the Grand Jury minutes** which spanned a total of seven pages of transcript and which included as many as sixty separate statements of Leuci's (G.X. 27a, A. 71-76, 88). Two out of sixty statements hardly indicates frequent "resistance." More significantly, when read in context, neither statement can reasonably be interpreted as

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* The Government apparently assumes that the fact of tape recording changes the trustworthiness and credibility of the speaker. When Leuci conversed with Rosner on October 13th, 1971, however, he (and he alone) knew that he was being tape recorded -- and he knew that the sole purpose of the recordings was to obtain criminal convictions. His supposed "resistance" statements may thus have been designed specifically to create a "record" of his own unwillingness and of Rosner's eagerness to make a deal and consequently cannot be seriously accorded any weight in determining Rosner's state of mind. In any event, the fact that the Government is forced, even when attempting to rely on "objective" evidence, to utilize Leuci's statements, demonstrates once again the utter absurdity and falsity of its claim that Leuci's word was "not crucial or of the least importance to the Government's case."

** The Government points also to one portion of the October 12th tape as allegedly demonstrating Leuci's "resistance" (G.Br. at 41). Rosner does not appear on that tape, however, so that the appellant cannot understand how Leuci's statements uttered in Rosner's absence, could even arguably be construed as evidence against Rosner.

evidence of "resistance." The first statement referred to by the Government is:

> "Leuci" You're talking about something that the mere possession of that is like he gets pinched, five on the spot..."
> (G.X. 27a, A. 72, quoted at G.Br. p. 42).

That statement occurred at the very end of a colloquy between Leuci and DeStefano -- not Rosner. In that colloquy, set out in the margin,* it was Leuci who

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* "Det. Leuci: No, No and you knew the documentation whatever there was, that was necessary about that business in Miami. All right now, that's all the stuff we had to get. Now I said to you, which I shouldn't have said, maybe. Now, you tell me I did say it. Now I don't remember, but you tell me I did say it. I must of said it, you know about. The Grand Jury Minutes.

"DeStefano: The 'G.J.s.'

"Det. Leuci: Yeh 'G.J.s' (laughs) are available and easy to get. Now, I mentioned it to him, you know, like that, and he said well let's see, you know, what's happening. As far as he's concerned, what he's done. He's completed his contract. Now, that's what he feels about it, now if I'm wrong, you know I'm not wrong, but, you know, that's where it's at. You talking about something - I don't know, I don't know, you know more about it than I do, Eddie. Let me ask you. He says to me, 'Number one," he says, "it's not in the folder." Number two, he can go get it, he has to get it.

INAUDIBLE

"Det. Leuci: Let him get in (laughs) it's a very very toucny thing. You're talking (etc.) ... like he gets pinched (etc.) ..." (G.X. 27a, A. 71). (Emphasis added)

raised the topic of the Grand Jury minutes for the first time during that meeting; it was Leuci who did virtually all the talking; and it was Leuci who volunteered another statement, ignored by the Government: "Yeh. 'G.J.s' (laughs) are available and easy to get." Leuci's subsequent comment about getting 'pinched" hardly appears resistant in that context. Moreover, prior to that comment, Rosner had made absolutely no request regarding the Grand Jury Minutes.*

The colloquy which immediately follows Leuci's comment further undermines the Government's characterization of the roles of the two key parties. The transcript reads as follows:

"Rosner:	I don't really figure (inaudible 1 second) (G contends exact money)
"Det. Leuci:	I'm not worried about him if he makes a commitment to me, whatever it is, you know, but he knows what he's doing, he's not doing it because he's you know, for love right.
"Rosner:	Right.
"Det. Leuci:	Understand if he's getting paid to do it he's gonna do it, then he'll have to do it. But that's where I am now.
"Rosner:	What does he have in mind?"

* Rosner had uttered only ten sentences before Leuci's getting "pinched" comment: three of those concerned what he would eat for dinner (G.X. 27a, A. 69-70), five of them concerned general gossip (Id., A. 68-69), and two concerned Rosner's disinterest in the Marcone indictment ("I don't want nothing to do with that"; "I'm not blaming anybody, I'm just saying..." (Id., A. 71).

Rosner's words, "I don't really figure" and "Right," and "What does he have in mind?" can hardly be interpreted as exertions of pressure on Leuci. Nor do Leuci's words, "I'm not worried ... if he's getting paid to do it ..." emanate a quality of resistance.

The second allegedly "resistant" statement of Leuci's, set forth in the margin,* also arose in the complete absence of a request by Rosner; indeed, it did not even relate to the topic of conversation which immediately preceded it.** Certainly it does not illustrate "Rosner's eagerness" nor prove "irrefutably" that he "insisted on receiving the grand jury minutes."

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* "Det. Leuci: All things being equal, personally, I don't know how you feel about this, but personally, you don't have to, you don't have to. You want the Grand Jury minutes only as icing on the thing for yourself, if you want if you want to spend another fifteen hundred dollars, a thousand dollars, to pay for the Grand Jury minutes, which you really don't need, I'll leave it up to you. But that's what it's going to be. It's not, what I say, you know" (G.X. 27a, A. 74, quoted G.BR. 42).

** Just prior to this statement, Leuci and Rosner had been discussing Rosner's concern about whether there would be three witnesses or four testifying against him in his then imminent trial, whether one witness was "missing", and whether the Government believed that Rosner was responsible for the disappearance of that witness. (See discussion infra at 29-30** for significance of this portion of the conversation) (G.X. 27a, A. 72-73). Rosner finally stated: "I don't know who the hell is missing. I thought maybe you knew. I don't know" (G.X. 27a, A. 73). Leuci's allegedly resistant "all things being equal ..." speech was his immediate response to Rosner's query regarding the missing witness.

In further support of this assertion, the Government notes (at G.Br. 43) that:

> "Rosner then said, 'It's worth it.' (G.X. 27a, A. 74).
>
> The three agree on a price of $1,500 for the minutes. Rosner asked Leuci "How long will it take him to get them?" Rosner emphasized that "We'll get them as a matter of right anyway. So with us it's just a matter of time, and we're paying a lot of money for nothing" (Id.,A. 78).

But not one of these selected items is unambiguous. Each can just as readily be interpreted as providing support for Rosner's claim that by October 13th, he was "panicky" and his "head was swimming." Since Rosner was aware that he would get the grand jury minutes "as a matter of right anyway ... it's just a matter of time"; and since he realized that "we're paying a lot of money for nothing"; his alleged statement that "It's worth it"* and his agreement to join in paying $1,500 for the minutes need not necessarily have been understood by a jury to reflect a cold, "calculating professional's judgment." These statements -- without Leuci's in-court testimony -- were certainly consistent with Rosner's fundamental position

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* Rosner has denied that he said "It is worth it"; his version of the transcript reads, "I don't think it's worth it." In the absence of Leuci's contradictory testimony -- which doubtless had the effect of undermining Rosner's credibility on all issues -- Rosner's own interpretation of this statement might be accepted.

that he had, by the 13th, already been entrapped and was thereafter unable to extricate himself.

b) Rosner's alleged "haggling" over the price of the Grand Jury minutes

The Government's assertion that the tapes "evidence" that Rosner "haggled" over the price of the grand jury minutes" -- and that therefore Rosner acted as a "calculating professional" rather than a victim of entrapment -- is wholly unsupported by a careful review of the October 13th tape.* Perusal of the entire "price" discussion (G.X. 27a, A.71-76) reveals that Rosner's contribution to that topic was practically non-existent; that he made no remark that can reasonably be construed as "haggling"; and that Leuci did virtually all the talking and controlled the direction of the conversation. Leuci first raised the question of obtaining payment for his contact, stating "he's not doing it ...for love right ... if he's getting paid to do it he's gonna do it" (G.X. 27a, A.71); Rosner answered only with "What does he have in mind?" (Id., A. 71-72). Leuci then directed the conversation to Rosner's concern about the witnesses who would be testifying against him (Id., A.72). Immediately after Rosner expressed anxiety about whether the Government

* The price of $1,500 was set at an early point in the October 13th meeting (G.X. 27a, A. 76). Presumably any "haggling" in which Rosner engaged must have occurred prior to that point and not at all on the 15th.

suspected him of having "had this guy hit" (Id., A. 73).* Leuci returned to the question of payment. He mentioned a price range -- "another fifteen hundred dollars, a thousand dollars" (Id.) -- and then sneered at his own lower figure ("a thousand" (inaudible 2 seconds) (laughter))" (Id., A. 74). Rosner's answer was simply "No, no." Leuci then began to press Rosner directly for money: "Eddie, if you haven't got the money nobody then nobody has it like (laughs) . . .. You haven't spent any money on this case. You haven't spent a nickel that's come to me . . .." (Id., A. 74).** Rosner replied evasively and Leuci immediately tried to tie the deal down to a "definite price" and to a definite delivery date. Rosner's response was to change the topic to the number of days left before trial, expressing hesitation about buying the grand jury minutes at all: "It's not going to do us any good -- we'll get it in court in a month" (Id., A. 75). But in the face of Rosner's hesitation, Leuci "guaranteed" Rosner that if he took the grand jury minutes, Rosner would have

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* The conversation regarding Rosner's concern with whether the Government suspected him of the witness' murder is significant corroboration of his "'remand murder Marcone' refrain." (See discussion below at pp. 29-30)

** This statement directly corroborates Rosner's trial testimony that on October 13th Leuci "pressed" him to buy the grand jury minutes, making statements like "What are you tight or something?" (Tr. 884-888, 1069). The Government's assertion that "the tape recording of the conversation simply reflects no such comments" (G.Br. 44) is clearly false.

everything he was "concerned about."* Leuci -- who until this point had been the only person who had mentioned any figure -- then unilaterally settled on a price of $1,500.00 ("Alright, alright, alright, so listen ... I'll put that to him, fifteen hundred dollars for the Grand Jury minutes.") Rosner accepted this figure without a challenge (Id., A. 75). (Rosner's sole concern was to obtain the minutes within a few days.)**

Clearly the Government is wrong in arguing that the tapes establish that Rosner haggled over the price; he passively accepted the amount set by Leuci. Moreoever, Leuci's careful control over the direction of the conversation -- his initiation of the "price" issue, and his playing upon Rosner's anxiety -- is wholly consistent with Rosner's testimony that Leuci induced and pressured him into buying the information.

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* "Leuci: I now, now, now as far as like, anything you're concerned about, now as far as those other witnesses and things like that you've got the whole case -- that's the way he's got it. You've got everything. I mean, what more is there to have other than the grand jury minutes" (G.X. 27a, A. 75).

** Even Rosner's concern with obtaining the grand jury minutes as quickly as possible was significantly less than "insistant." On Friday, October 15th, the date on which Leuci had agreed to deliver the minutes, Leuci said to Rosner "You gotta give me, give us (inaudible 1 second) -- the way it's left now (inaudible 1 second) till Tuesday." Rosner acquiesced with no insistence of any sort; he replied simply "alright" (G.X. 28a, A. 107).

c) Rosner's alleged laughing participation in the Quinones conversation

The only actual contributors to the Quinones conversation were, once again Leuci and DeStefano. The Government's claim that Rosner also "participated" in the conversation is based solely on the following non-substantive remark, made after the conversation had covered 3½ pages of transcript:

> "Listen, I don't know what's happening but I'm listening" (G.Br. 43).

Even if, as the Government claims, Rosner made this statement laughingly (G.Br., p. 43, note), its plain meaning -- taken in the context of Rosner's failure to make any other comment during the entire conversation -- is that Rosner did not participate in, but was at most an observer of, the conversation.*

Despite the Government's inclusion of this incident in its list of taped "evidence" it is obvious that the Government itself regards the incident as trivial. It never presented the incident to this Court on appeal as an example of Rosner's alleged interest in other cases, and it treated it only as a footnote at G. Br. p. 43 . It has apparently resurrected this episode in an effort to develop any fragment

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* Rosner testified -- and it is undisputed -- that prior to the Quinones conversation he had left the dinner table to telephone his wife; and when he returned Leuci and DeStefano were in the midst of the conversation. However, even without this testimony, the transcript leaves no doubt that Rosner at most listened to the conversation, and neither initiated nor contributed to it (Tr. 1138-1142).

of "evidence" appearing on the tapes which could conceivably support its claim that Rosner sought to acquire information about cases other than his own. Plainly, even if the Quinones incident were "evidence" in support of that claim, it cannot be deemed evidence which would necessarily have led the jury to a verdict of guilty even in the face of the destruction of Leuci's credibility.

d) Rosner's alleged effort to obtain information about Stewart

The Government points to three ambiguous words spoken by Rosner on October 15th* to support its claim that Rosner "told Leuci to get information about Stewart." Those three words, however, are susceptible to different interpretations and depend, for any incriminating interpretation, on Leuci's live testimony.

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* Although the Stewart matter came up twice on October 13th, both of those discussions occurred between DeStefano and Leuci alone, and outside of Rosner's presence. In the first, Leuci referred to Stewart as "their number one rat," (G.Br. at pp. 41-42), and in the second, Leuci offered to give DeStefano information about Stewart's whereabouts (G.Br. at p. 44). The Government appears to consider these two conversations to be additional items of proof of Rosner's predisposition. However, as the conversations occurred in Rosner's absence; as there is no evidence that Rosner authorized any of the remarks made by either Leuci or by DeStefano (at most there is evidence that DeStefano "told (Rosner) about" DeStefano's interest in Stewart (G.X. 28a, A. 109, quoted G.Br. 44); and as, once again, it was Leuci who made the truly incriminating statements -- these conversations simply cannot stand up as "irrefutable" proof of Rosner's predisposition. The October 15th conversation regarding Stewart was also conducted principally between DeStefano and Leuci; Rosner's limited participation in it is discussed in the text above.

According to Leuci's trial testimony, Rosner used the words "take another peek" as part of a request that Leuci obtain information about Stewart (Tr. A. 176). The tape transcript however reflects absolutely no such request. The three words follow immediately upon Leuci's taped statement that his BNDD contact had looked for Stewart's record but had found nothing; "so now, (Leuci ends) the only thing I could say is the guy didn't look enough . ." (G.X. 28a, A. 111). When read in context -- and in the absence of Leuci's trial testimony -- Rosner's remark might well have been understood by a jury to be nothing more than a conversational response to Leuci's prior comment that his BNDD contact's first "look" for Stewart's record was not sufficient and that therefore another "peek" would be required. This latter interpretation is wholly consistent with Rosner's testimony that his participation in the Stewart discussion was not motivated by a personal desire to obtain information about Stewart, and that he participated merely because he "was being a nice guy" (Tr. 1115-1116). In any event, the Stewart matter, like the Quinones incident, clearly falls far short of the Government's grossly exaggerated claim of "irrefutable" evidence.

Indeed, when the tapes are examined objectively -- without regard to Leuci's trial testimony -- not one example of Rosner's alleged interest in "various pending cases", other than his own, holds up. Neither in the case of

Quinones, nor of Stewart, nor of Marcone* do the tapes provide the unambiguous evidence which the Government must find in order to substantiate its wild claim that the tapes prove Rosner's predisposition so conclusively that the jury could not possibly have reached any other verdict even if they had discounted Leuci's testimony.**

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* The tape evidence concerning the Marcone incident is developed fully in the appellant's main brief (App. Br. at 49-50). It proves precisely the opposite of the Government's previous claim; namely it proves that Rosner himself was not ever interested in obtaining the Marcone indictment.

** In its urgent insistence that the tapes compel a finding of Rosner's guilt, the Government totally ignores evidence on the Tapes which corroborates Rosner's defense. For example, the tapes provide the following evidence that Rosner's sole interest was in his own case and that he did not desire information about cases in which he was not involved. On October 13th, Rosner and Leuci engaged in this exchange:

"Det. Leuci: And your big concern is the case, right?

"Rosner: Absolutely. I don't give a shit about (inaudible 1 second) (G.X. 27a, A. 73).

During the same meeting, Rosner is recorded rejecting a specific offer by Leuci to obtain information not related to his own case:

"Det. Leuci: (Pause 5 sec) can any other information help you as far as like before, before the other indictment that we spoke about already the thing about Russo going down to Miami and this other shit.

"Rosner: Will it help me, no I don't . . . Not important, that other stuff helps but ahh. not important, not really" (G.X. 27a, A. 83).

Contrary to the Government's assertion (at G.Br., p. 48, note), the tapes also provide corroboration for what the Government characterizes as Rosner's "murder, remand, Marcone" theme. First, the tapes provide direct

(footnote continued on following page)

(footnote continued from preceding page)

corroboration of Rosner's testimony that he received information from Leuci, both directly and indirectly, that he was the target of a wide-ranging Governmental investigation into all of his past activities (over and above those relating specifically to the act charged in Rosner I) (See 508-510, 499, 506, Tr. 864-865). The tape of October 13th contains a specific discussion between Leuci and Rosner about Rosner's belief -- and the source of that belief -- that he was suspected by the government of murdering Hernandez:

"Rosner:	If they use those people (as witnesses against me), one of those three people, they're supposed to be missing. <u>What I was told by you, they think that I had this guy hit</u>.
"Det. Leuci:	No, no, no. They didn't say, you know, our man was clipped.
"Rosner:	Because I didn't, I don't know. I was relying on what you
"Det. Leuci:	They're saying, they're saying, according to him that they're sure that a guy's been clipped in this, because they just can't find the guy.
"Rosner:	That must be Hernandez, he seems to be missing
"Det. Leuci:	INAUDIBLE
"Rosner:	I don't know who the hell is missing. I thought maybe you knew. I don't know" (G.X. 27a, A74). (Emphasis added)

Rosner's words, "What I was told by you, they think that I had this guy hit . . . I was relying on what you . . ." leave no doubt that Rosner believed that Leuci had been the source of information regarding Rosner's complicity in Hernandez' disappearance.

III. THE GOVERNMENT'S ATTEMPT TO ABDICATE ITS RESPONSIBILITY FOR LEUCI'S PERJURY

The Government seems to concede what Judge Bauman seemed to conclude: that the perjury of a Government undercover agent could be attributable to the Government as long as that agent did more than appear as a Government witness; i.e., that it could be attributed if the agent participated in the investigation or prosecutorial preparation of the case (See. G.Br. 28-29). The appellant invites this Court to apply that test to the undisputed facts of this case. It is difficult to imagine any Government agent having a more active role in the "investigation or prosecutorial preparation of this case." Simple stated, Detective Robert Leuci was the creator and chief investigator of the entire case against Rosner. How the Government can ask this Court to conclude -- on the undisputed facts of this case -- that Leuci played no role in the investigation or preparation of this case "except insofar as he was a witness to the events in question..." requires an explanation which is conspicuously absent from its brief.

Moreover, the Government's "policy" argument against attributing Leuci's knowledge to the Government does not withstand analysis. The Government argues that: "It is impossible to conceive how the Government can be expected to enter into the mind of an agent who unilaterally takes it upon himself to lie about matters unrelated to guilt or innocence" (G.Br. 30).

That argument would apply with equal strength to an Assistant U.S. Attorney who "unilaterally takes it upon himself" to lie or to fail to make a required disclosure. Yet the courts have concluded that the acts and omissions of individual prosecutors are attributable to the Government. Among the policies underlying these decisions is the need to encourage the Government to exercise extreme diligence in the supervision and selection of its agents.

These policies apply with special force in the instant case, where several Assistant U.S. Attorneys admitted that they did not want to press Leuci too hard about his past crimes, lest they endanger his cooperation. In fact, Scoppetta admitted that in selecting Leuci he had thought it important to pick a man with a "reputation as a corrupt cop" (A. 635), and that he suspected that Leuci, in revealing so little past corruption, "might have had a more extensive history of criminality" (A. 636). The Government should surely be responsible for the combined failures of Leuci to admit his criminal record, and of Shaw and Scoppetta to press him about his prior criminal activities. Failure to attribute knowledge of Leuci's perjury to the Government will doubtless encourage Government prosecutors not to press their agents for full disclosure. Under the Government's approach, it would

have everything to gain and nothing to lose by not pressing its agents for the truth.

Respectfully submitted,

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